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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANK G. SCHLOSSER,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered October 7, 1947, which affirmed the order of the district court dismissing a petition filed before indictment to suppress as evidence things seized by agents of the Alcohol Tax Unit of the Treasury Department without warrant and in violation of the Fourth and Fifth Amendments.

Opinions Below

The Circuit Court of Appeals affirmed without opinion (R. 133). The opinion of the district court (R. 123-127) is reported in 70 Fed. Supp. 764.

Jurisdiction

The judgment of the circuit court of appeals was entered October 7, 1947 (R. 134), and this Petition is filed November 5, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Appealability of Judgment

Appeal will lie in proceedings before indictment to suppress evidence illegally seized. Such proceedings are independent actions undertaken before institution of the criminal case as such. *Go-Bart Importing Company v. United States*, 282 U. S. 344, 356; *Burdeau* v. *McDowell*, 256 U. S. 465; *Perlman v. United States*, 247 U. S. 7, 13. In the court below the Government stated that it did "not question the appealability of the decision in view of *In re Sana Laboratories, Inc., et al.*, C. C. A. 3, 115 F. 2d 717 and *Cheng Wai* v. *United States*, C. C. A. 2, 125 F. 2d 915."

Questions Presented

Whether revenue officers have power, despite the mandate of the Fourth Amendment, to act without search warrant under a situation in which the Government possessed full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

Whether search and seizure in such circumstances is unconstitutional.

Statement

After their arrest, but before indictment, petitioners applied to the district court under Rule 41(e) of the Rules of Criminal Procedure (1946) for return of property taken and suppression of evidence on the ground that the same was illegally seized without warrant (R. 2-4). This is the practice sanctioned by precedent and the new rules. *In re*

Fried, C. C. A. 2, 161 F. (2d) 453, 458, note 1 collecting the cases. In cases of the present type involving contraband property which cannot be returned, the purpose and effect of the motion is to secure restraint against use as evidence rather than actual return of the contraband articles.

In the district court for the purpose of the motion affidavits were submitted by the Government and petitioners offered the record of the preliminary examination before the United States Commissioner taken at Asbury Park, in the county in which the search and seizure were effected.

The Government did not claim that circumstances prevented the obtaining of a warrant, but offered as sole justification for the action the fact that crime was being committed in the presence of the revenue officers, for which reason search and seizure were said to be proper as incident to a lawful arrest on view. The petitioners showed that the Government possessed full prior knowledge of the continuing *corpus delicti* incident to operation of an illicit still, opportunity to obtain warrant from the judicial department and ample time within which to seek it, but had deliberately refrained from obtaining any warrant; they maintained that for such nonfeasance the acts of the revenue officers were unreasonable and in violation of the Fourth and Fifth Amendments.

The evidence on the motion came from the government officers and from Kell, the informer. It was not in conflict and showed the following facts: in January, 1946, petitioners sought to lease part of the Kell farm located in Allenwood Township, Monmouth County, New Jersey. Kell, suspicious of their motives, reported the matter to the Government but was permitted to accept the offer provided he would cooperate with the Treasury Department and keep them informed of all developments (R. 78-80, 85-87, 91-96). In mid-February the Government arranged with Kell to receive Alcohol Tax Unit Investigator Nilson

on the farm in the disguise of a farm hand, whereupon Nilson appeared on the premises and performed farming operations for Kell until June 3, the date of the raid (R. 44, 98-101, 116). Toward the end of March Kell leased part of his farm to petitioners and introduced Nilson to them as a relation of Mrs. Kell. Under instructions of his superiors, Nilson then became an employee of petitioners and, with Kell, assisted in erecting barn and still, accepting money for his labor and turning it over to the Government, at the same time keeping his superiors constantly informed concerning progress in erecting the still.

The still commenced to operate on May 13 and Nilson thereafter worked as mash man for $100 a week, assisting daily in the operation of the plant and making prompt and frequent reports to his superiors in the Treasury Department (R. 58-72, 113-114, 116-117). The Government permitted the still to be operated for three weeks, from May 13 to June 3, at which latter date the premises were raided. During this period Nilson assisted daily in the production of alcohol (R. 70). On May 20 Nilson personally conferred with his superiors, reported in full detail and turned over to them samples of each run of alcohol (R. 114, 117).

At this time the still had been in full operation for one week and, through Nilson, the Government was in complete possession of every detail in the case, including identity of the principals. Thus on May 20 and thereafter the Government had ample evidence on which to apply for a warrant. It has never claimed otherwise. No warrant was sought (R. 75).

On May 26 a radio set was dispatched to Nilson through other revenue officers and he used this device to transmit frequent bulletins to his superiors (R. 117). Again no warrant was applied for, although the evidence was more than ample to permit seeking one. On May 31, on radio intelli-

gence supplied by Nilson, a motor vehicle loaded with 94 five-gallon cans of alcohol was seized by the Government at Newark, New Jersey, about an hour after it had left the farm. The driver was arrested (R. 114, 117-118).

The seizure of truck and alcohol took place some 76 hours before the raid, yet in all the intervening time the Government made no effort to obtain a warrant. The Alcohol Tax Unit operates out of Newark, in which city district court judges sit daily and a United States Commissioner is always available; another is available at Asbury Park, Monmouth County, a twenty minute drive from the Kell farm. Future events disclosed that the revenue officers never intended to obey the mandate of the Fourth Amendment and that they purposed to act without putting the matter before the judicial department. There could have been no difficulty in obtaining the warrant, the evidence being in possession of the Government, but again the Government deliberately avoided seeking any warrant.

On June 3 Nilson radioed that two of the principals were at the still and that a load of sugar was due to arrive (R. 114, 118-119). Nilson knew then that the raid would be made that night, for he told Kell that "tonight is the night" (R. 107). The raid took place shortly before midnight, entirely without warrant (R. 15), although one could easily have been obtained. Indeed, the drama of the midnight descent of the revenue men on the still would have been perfectly possible and lawful under the warrant, for the Government had positive evidence in its possession through Investigator Nilson that the still, mash and equipment were in the place to be searched. 18 U. S. C. A., Sec. 620.

The actual raid was carefully planned and well executed by very skillful officers who, tongue-in-cheek, asserted that the odor of mash led them to suspect operation of a still and that, through an open door of the barn, they ob-

served the still, fires banked, and one of the petitioners, Antoniole, in the barn (R. 10-11). Arrest on view followed and in turn was followed by search and seizure.

The facts showed, however, that the elaborate actions of the raiding party were mere deception amounting to nothing more than self-serving declarations designed to simulate an emergent arrest necessarily made without warrant, and thus to give to an utterly lawless act the appearance of legal innocence.

The district court saw nothing unconstitutional in the foregoing method of waging war on crime. He applied the familiar rule that no warrant is required to arrest on view and that search and seizure in such circumstances are not unreasonable. This rule is merely an exception to the broad rule that search and seizure without warrant are unlawful, but the effect of the district court decision is to make the exception the broad rule and to nullify much of the protection intended by the Fourth Amendment. Justification for the ruling must be found in what the court said: "The government agents herein were not pressed for time but we do not think that their failure to procure a search warrant during this period requires suppression of the evidence they found. They were drawn to the scene of the alleged crime by one of their own number allegedly working with the suspects. This was good police work and efficient crime detection" (R. 127). There was "no fracture of the defendants' constitutional privileges" (R. 127), and under the circumstances the search was not unreasonable, the court ruled. 70 Fed. Supp. 764, 765, 766.

Specification of Errors to Be Urged

The circuit court of appeals erred:

1. In holding that revenue officers have power, despite the mandate of the Fourth Amendment, to act without warrant under a situation in which the Government possessed

full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

2. In holding that an arrest and search, made on view without warrant and without any necessity, real or apparent, for such summary action is not in violation of the Constitution, Fourth and Fifth Amendments.

3. In holding that the constitutional rights of the petitioners were not, in this case, infringed upon by action without warrant.

4. In affirming, instead of reversing the judgment of the district court dismissing the petition for return of property and suppression of evidence.

Reasons for Granting the Writ

As Interpreted by this Court only unreasonable searches and seizures are forbidden by the Fourth Amendment, with each case to be decided on its own facts and circumstances. *Harris* v. *United States*, 331 U. S. 145, citing *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 357. The holding below that search and seizure on view and without warrant are not unreasonable, no matter how great the nonfeasance of the officers in refusing to apply for a warrant, unconstitutionally dilutes the special protection intended by the Fourth Amendment and is clearly wrong. A *bona fide* arrest, on view or on warrant, followed by an incidental search as in the *Harris* case is said to justify search and seizure as "reasonable," but in the present case there was no *bona fide* need for proceeding without warrant, thus rendering what was done here "unreasonable."

While officers acting in good faith may proceed without warrant because of emergent need and thus "reasonable," it is otherwise if through their own deliberate nonfeasance they refuse to seek a warrant, for they can hardly derive

an advantage from their own wrong. There was no need in this case, real or apparent, for action without warrant. Nilson, the undercover investigator, could easily have made the required affidavit even to the extent of supporting a night raid, because he could have sworn positively that the contraband property was in the place to be searched. 18 U. S. C. A., Sec. 620. The search warrant would have been good for ten days. 18 U. S. C. A., Sec. 621. Congress never intended to give to the Treasury officers the power they used here, for they are limited to obtaining warrants. 26 U. S. C. A., Sec. 3602, 3117, Internal Revenue Code.

The ruling below actually puts a premium on evasion of the Fourth Amendment, for when no warrant is sought it cannot be held defective. Thus the executive department is encouraged to proceed without warrant, although the intent of the amendment is otherwise. So reluctant is Congress to grant plenary powers to enforcement officers that even the F. B. I. cannot arrest without warrant "except where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." 5 U. S. C. A., Sec. 300a. This restriction is indicative of a congressional intent to compel officers to obtain the license of the judicial department unless time will not permit.

Persons suspected of defrauding the revenues by manufacture of alcohol do not, because of such suspicion, lose the protection of the amendment. They have every right to complain of infringement, not only because the constitution affords refuge in such complaint but because it is beneath the dignity of a free people to tolerate law enforcement grounded in violation of the basic law. That a generous policy permits complaint on the part of unsavory persons for violation of their constitutional rights is because a great people insist that it be that way. There are rules of war applicable to the fight upon crime, the first of which is that officers must keep within constitutional bounds, and

when these rules are violated the officers will lose the fruits of their zeal.

If existence of the Fourth Amendment should hamper law enforcement to undue extent the remedy is to repeal the amendment and not to nullify it by judicial construction, but in truth much of the complaint against the amendment by officers is unfounded. Laws can be and are enforced daily without either third degree or other unconstitutional acts, for there are few crimes that competent officers, willing to apply ability and energy to the task, cannot ferret out in a lawful fashion. Those few unfound offenses may go unprosecuted without the country going to ruin, for in the words of Mr. Justice Holmes, "we must consider the two objects of desire both of which we cannot have, and make up our minds which to choose." *Olmstead* v. *United States,* 277 U. S. 438, 470. In the present case the warrant was readily obtainable and proper law enforcement was entirely unhampered by the amendment.

Hitherto search could not be made without warrant when opportunity to obtain the warrant existed. *Carroll* v. *United States,* 267 U. S. 132, 156; *Taylor* v. *United States,* 286 U. S. 1, 6. Last term, in *Harris* v. *United States,* 331 U. S. 145, by divided vote this Court decided that a *bona fide* incidental search after lawful arrest under warrant is not unreasonable, but in the present case there was no warrant of any kind, ample prior knowledge, time and opportunity existed to obtain the warrant and the officers acted deliberately without judicial sanction, not claiming necessity for such summary action.

The *Taylor* and *Carroll* cases in this Court, and in the second circuit the cases of *In re Milburne,* 77 F. (2d) 310, 311, and *United States* v. *Edelson,* 83 F. (2d) 404, state that where government agents have ample opportunity to procure a warrant they must do so. In the third circuit, after affirmance of the present case, a contrary rule prevails.

Manifestly, therefore, the decision below presents a question of fundamental importance in constitutional law and Federal criminal practice, which must be decided by the authoritative decision of this Court.

The petitioners therefore respectfully submit that their petition for a writ of certiorari should be granted.

FRANK G. SCHLOSSER,
Attorney for Petitioners.

November 5, 1947.